



Adults with Incapacity (Scotland) Act 2000: Proposals for Reform

RESPONDENT INFORMATION FORM

Please Note this form **must** be completed and returned with your response.

Are you responding as an individual or an organisation?

- Individual
 Organisation

Full name or organisation's name

Scottish Commission for Learning Disability (SCLD)

Phone number - 0141 248 3733

Address

5th Floor Suite 5.2, Stock Exchange Court, 77 Nelson Mandela Place, Glasgow,

Postcode – G2 1QY

Email

Lorne.b@sclد.co.uk

The Scottish Government would like your permission to publish your consultation response. Please indicate your publishing preference:

- Publish response with name
 Publish response only (without name)
 Do not publish response

Information for organisations:

The option 'Publish response only (without name)' is available for individual respondents only. If this option is selected, the organisation name will still be published.

If you choose the option 'Do not publish response', your organisation name may still be listed as having responded to the consultation in, for example, the analysis report.

We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

- Yes
 No

Adults with Incapacity (Scotland) Act 2000 – Consultation on Proposals for Reform

Background

The Scottish Commission for Learning Disability (SCLD) is an independent charitable organisation and lead strategic partner to the Scottish Government in the delivery of Scotland's learning disability strategy, *The keys to life* (2013). The strategy defines a learning disability as a significant, lifelong, condition that started before adulthood, which affects development and means individuals need help to understand information, learn skills, and cope independently. SCLD is committed to finding new and better ways to improve the lives of people with learning disabilities and is focused on sharing innovation and good practice so that those providing services and interventions can learn from each other. SCLD also aims to be a knowledge hub and to build an evidence base, sharing how policy is being implemented and building on an understanding of what really works. We welcome the opportunity to respond to the Scottish Government's proposals for reform to the Adults with Incapacity (Scotland) Act 2000.

General Comments on Proposals for Reform

SCLD welcomes with the Scottish Government's intention to reform the Adults with Incapacity (Scotland) Act 2000 (AWI). The Act, which created a system for safeguarding the welfare and managing the finances and property of adults who lack capacity, was regarded as ground breaking piece of legislation when first introduced. However, the legislation has increasingly been criticised for not being fully aligned with the Convention on the Rights of Persons with Disabilities (CRPD) and practices which reflect the principles of supported decision-making. In our view, there is a strong argument in favour a more comprehensive review of the whole legislative framework regarding non-consensual care and treatment.

The UNCRPD states that everyone with a disability should enjoy 'legal capacity on an equal basis with others in all aspects of life.'¹ The current legislation risks depriving people with learning disabilities of their autonomy and the exercise of their legal capacity. It therefore compromises their independence and their ability to exercise choice and control, two of the four strategic outcomes in implementation framework for *The keys to life* strategy. It is critical that in all instances people with learning disabilities are supported – either to make a decision for themselves or, if that is genuinely not possible, to ensure that a decision is made on their behalf which respects their rights, will and preferences.

Decision-making capacity is not an all-or-nothing issue. An adult may lack capacity to make certain decisions for themselves, but have capacity to make other decisions and this may change over time. An adult's capacity for agency and autonomy is, therefore, on a spectrum and legislation needs to reflect this. In our view, the current

¹ [UN Convention on the Rights of Persons with Disabilities](#)

proposals appear overly rigid and reductive as they assume an identifiable cut-off point at which 'support' fails and an intervention is required. We are also concerned that they do not sufficiently address the issue of greater involvement by the adult in decision making. Rather, they essentially replicate a form of substitute decision making which removes a person's legal capacity and vests it in someone else.

We would like to see legislation which takes as its starting point, supporting rather than restricting people's ability to make decisions, and which facilitates an asset based as distinct from a deficit based approach. Such an approach means supporting people to make decisions whenever and wherever possible.

We propose that the legislation should provide for a framework of support, including measures which range from light touch assistance to intensive support. Such a framework should allow for the possibility that intervention will be necessary in certain circumstances but the onus should be on those providing support to demonstrate that it is unavoidable.

We believe there is an opportunity for these proposals to be reframed as an enabling piece of legislation, genuinely rights based, the principle of which is to provide appropriate support to individuals whose capacity may be limited rather than to remove legal capacity from them. This, however, will require a clear shift away from substitute decision-making towards embedding supported decision making in legislation, policy and practice.

Chapter 3 - Restrictions on a Person Liberty

Do you agree with the overall approach taken to address issues around significant restrictions on a person's liberty?

The Cheshire West ruling by the UK Supreme Court in 2014² and the findings of the Scottish Law Commission's report on Adults with Incapacity³ highlight the need for further legal and procedural safeguards to protect those considered unable to consent to a deprivation of liberty. At present under current law many adults with learning disabilities in Scotland who are deemed to lack capacity and who live in care homes and hospitals in Scotland could be regarded as deprived of their liberty, in violation of their rights under Article 5 of the ECHR⁴.

We welcome the intention in the proposals to take account of not only where a person lives but also how a person lives when considering restrictions on their liberty. In our view, this will enable a more holistic approach which also takes into consideration the appropriateness of the care being provided. For example a person may be perfectly content to agree to moving to another place of residence but may

² [Deprivation of Liberty Advice Notes, Mental Welfare Commission \(2015\)](#)

³ [Report on Adults with Incapacity, Scottish Law Commission \(2014\)](#)

⁴ [European Convention of Human Rights](#)

not agree with aspects of their care which themselves amount to significant restrictions on their liberty.

We agree that if an adult is able to express their valid consent through words or actions to a placement, and/or any conditions of that placement then that is sufficient for a placement, or change in conditions to proceed. It is imperative that, when a placement or change in a care regime is being considered for an individual which may result in them being subject to significant restrictions on their liberty, every effort is made to support them to understand the proposal and express their view on the matter. This requires meaningful engagement and consultation/discussion to maximise their capacity and try to seek their informed consent in order to avoid a deprivation of liberty.

Depriving someone of their liberty has serious implications for an individual's autonomy and the exercise of their legal capacity. It therefore compromises their independence and their ability to exercise choice and control, two of the four strategic outcomes in The keys to life strategy. The UNCRPD states that everyone with a disability should enjoy 'legal capacity on an equal basis with others in all aspects of life.'⁵ For that to happen, it is critical that in all instances people with learning disabilities and others who are deemed to lack capacity are supported – either to make a decision for themselves or, if that is genuinely not possible, to ensure that a decision is made on their behalf which respects their rights, will and preferences. This must be backed up by meaningful and robust obligations.

Do you agree with approach to definition of 'significant restriction on liberty' defined as the following;

- The adult is under continuous supervision and control and is not free to leave the premises
- Barriers are used to limited the adult to particular areas of premises;
- The adult's actions are controlled by physical force, the use of restraints, the administration of medication or close observation and surveillance.

We agree with the examples given above in defining a 'significant restriction on liberty'. There are a number of additional situations not considered in the proposals which we think could potentially constitute a deprivation of liberty:

- Someone only being allowed out when accompanied by staff
- Any care treatment that the person objects to (verbally or physically)
- Restriction over contact with others
- The use of technology as a means of control

Are there any other issues we need to consider here?

What constitutes an 'apparent objection' requires careful consideration. There is an implicit assumption that individuals are aware of their right to object but this may not

⁵ [UN Convention on the Rights of Persons with Disabilities](#)

be the case. Because having a learning disability can have an impact on a person's ability to understand information, people with learning disabilities can feel disempowered and unable to object to decisions made by significant others about their lives. A new framework for supported decision making should take this into consideration and make appropriate provisions to alleviate these concerns.

Chapter 4 – Principles of the adults with incapacity legislation

Do you agree that we need to amend the principles of the AWI legislation to reflect Article 12 of the UNCRPD?

Does the proposed new principle achieve that?

Are there any other changes you consider may be required to the principles of the AWI legislation?

The principles of AWI legislation are intended to make sure that a person's independence of thought and action is maintained as far as is possible when interventions under the legislation are being considered. We agree that the principles require amendment to reflect Article 12 CRPD in order to maximise the autonomy of individuals who may have some form of impairment in their ability to make decisions for themselves. By amending the principles there is an opportunity provide a strong underpinning for the reframing of AWI as a supportive, rather than a restrictive, piece of legislation which is rights based. We are clear that a fundamental shift in perspective is required away from a deficit-based approach which focuses on assessing a person's (lack of) capacity, towards an asset-based approach which assesses whether the support that is provided to an individual is adequate to enable them to make decisions and exercise legal autonomy.

The proposed new principle reads:

There shall be no intervention in the affairs of an adult unless it can be demonstrated that all practical help and support to help the adult make a decision about the matter has been given without success.

We believe this is a move in the right direction. However, we have concerns that the term 'without success' could be interpreted as making a decision deemed appropriate by others, providing leeway for a paternalistic approach. The current AWI principles do not place any primacy on the will and preference of the individual as the adult's wishes and feelings are only one of a number of principles, and even then, only require to be 'taken account of'. We would like to see this changed to give greater effect to the person's reasonably ascertainable wishes.

A possible alternative form of words could be;

There shall be a duty to provide all practical help and support to an adult to enable them to make a decision without intervening in their affairs. Intervention should be a last resort and should only occur where those providing help and support are able to

demonstrate that they have been unable to support the individual to make a decision or ascertain the person's wishes.

There is broad consensus that at present the current AWI principles are not consistently applied in practice. Therefore, the duties attached to them, and the scrutiny of the performance of those duties, require to be more robust. It is not clear how adherence to the new principle would be evidenced and tested. In our view, it is critical that it is backed up by an attributable and enforceable duty to provide evidence of its being performed alongside clear guidance about who bears the responsibility for providing the support.

Is a further principle required to ensure an adult's will and preferences are not contravened unless it is necessary and proportionate to do so?

We think a further principle is required which safeguards individuals' rights by ensuring that an adult's will and preferences are only contravened in actions under the Act if it is shown to be a necessary and proportionate means of protecting the full range of the person's rights and freedoms. This additional principle should make explicit reference to the role of mechanisms such as independent advocacy, advance statements and a named person. Fewer interventions will be required as the system becomes more responsive to providing appropriate levels of support for people.

Chapter 5 – Powers of attorney and official supporter

Do you agree that there is a need to clarify the use of powers of attorney in situations that might give rise to restrictions on a person's liberty?

We agree there is a need to clarify the present uncertainty regarding the use of powers of attorney. We are concerned that powers of attorney do not provide sufficient safeguards to ensure an adult is not subject to unlawful significant restrictions in their liberty if the authority to create such restrictions rests solely in a power of attorney. Welfare powers of attorney are not subject to review and supervision in the way guardianship orders are. It is important that attorneys are supported to understand their role, what powers they have and how to exercise them appropriately. In our view regular reviews should be an automatic requirement of power of attorney. Furthermore there is a requirement for sufficient safeguards including access to a judicial procedure capable of determining the lawfulness of the individual's detention.

If so, do you consider that the proposal for advance consent provisions will address the issue?

It is important to ensure that the power of attorney document is clear about when it comes into force and that it gives enough authority to make certain decisions about a person's care and welfare. Individuals should be able to make advance decisions in relation to arrangements which may amount to a deprivation of liberty, as an exercise of their legal capacity. Therefore, the suggestion for a requirement that a

power of attorney contains clear instructions on how the granter wishes their incapacity to be determined before it comes into effect is welcome. However, this should be accompanied by appropriate support and education to make the measure meaningful to people and ensure it is well used. It is our understanding that at present power of attorney is poorly understood among people with learning disabilities, their families and professionals also. It is essential that individuals truly understand what they are consenting to where power of attorney is concerned.

Do you think there would be value in creating a role of official supporter?

We see value in the creation of a role which gives clear authority to support the individual in making decisions and in having those decisions legally recognised. As will be discussed in greater detail later we believe there is potential for more evolved supported decision-making role in place of Grade 1 guardianship. However, there is also potential merit in creation of an 'official supporter' who assists the adult to make the decision but has no authority beyond that.

The models in '*Supported Decision-Making: Learning from Australia*'⁶ highlights the importance of building the knowledge and skills of family members and friends as an effective way to support and sustain decision-making ability. However, there should not be an assumption that everyone has supportive and trusted family members or friends who are able to perform his role. Some people lack these networks and it will be important to ensure that their support needs are met too.

There is also potential for confusion about the distinction and hierarchy between the various roles of official supporter, named person, attorney, guardian, independent advocate. There is a need for clear guidance on this as well as sufficient consideration paid to the education and assistance the supporter will require to help them understand what the role does and does not involve, as well as the criteria for becoming a supporter.

Chapter 6 - Capacity assessments

Should we give consideration to extending the range of professionals who can carry out capacity assessments for the purposes of guardianship orders?

Capacity assessments currently play a pivotal role within the current system in determining an individual's access to their rights. It is necessary to spend significant time with a person to properly assess capacity and decision making ability and it is vital that professionals receive right training, support and supervision assessment to undertake assessments. The current AWI legislation has been criticised for not being clear about how professionals should assess capacity and it is argued this has led to some people's right to autonomy not being respected in practice⁷. Capacity

⁶ [Supported Decision-making: Learning from Australia, Killeen \(2016\)](#)

⁷ What has Human Rights got to say about care and Dignity?, Joanna Ferrie (2009)

assessments can pose significant restriction or removal of legal capacity and we would like to see greater consistency by those who currently carry out assessments.

Until more consistent practice has been developed and demonstrated, we would therefore urge against widening the category of those able to make capacity assessments. There may be an argument for certain other practitioners such as psychologist being suitably placed to carry out capacity assessments but we find it difficult to see where it would be appropriate for dental practitioners, ophthalmic opticians, or registered nurses to do so.

More fundamentally, we would question whether it is possible to determine a precise point at which a person can become incapable of making decisions. The Committee on the Rights of Person with Disabilities is clear that “the provision of support to exercise legal capacity should not hinge on mental capacity assessments; new, non-discriminatory indicators of support needs are required in the provision of support to exercise legal capacity”⁸. We would favour a shift from testing the functional capacity of the individual to testing the robustness of the support offered. In this sense assessments would take an asset-based approach which focuses on whether the support provided to the person is adequate and appropriate to the task in hand.

We are aware, however, that considerable further work is required to develop the appropriate tests which would ensure that people are provided with support when they need it and are not unduly deprived of their legal capacity.

Chapter 7 – Graded guardianship

Do you agree with the proposal for a 3 grade guardianship system?

Decision-making capacity is not an all-or-nothing issue. An adult may lack capacity to make certain decisions for themselves, but have capacity to make other decisions and this can change over time. In this sense an adult’s capacity for agency and autonomy is on a spectrum and guardianship needs to reflect this. While we think there is potential in the idea of creating gradations of guardianship we do not think that the proposed system of grades sufficiently addresses the issue of greater involvement by the adult in decision making. It essentially remains a form of substitute decision making which removes a person’s legal capacity and vests it in someone else. Furthermore it still assumed an identifiable cut-off point at which ‘support’ fails and an intervention is required.

We believe that the concept of guardianship need to be reframed towards a support model in order to achieve a significant move away from substitute decision-making. We propose that all the measures within the legislation should be constructed as a form of support, ranging from light touch assistance to intensive support similar to intervention only in appropriate circumstances as described above. There is also potential to make greater use of assisted communication tools and technological

⁸ Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of the United Kingdom of Great Britain and Northern Ireland (2017)

supports and innovations. Those with the most complex needs, who face challenges in making any decisions in a meaningful way may, in some/certain circumstances require what could be regarded as '100% support' based on the best interpretation of their will and preferences. We see a role for non-instructed advocacy in such circumstances. In our view this type of approach would encourage an assets based approach to decision making rather one which is deficit based.

We also suggest that consideration should be given to changing the name of Guardianship to something that better reflects the reframing of the legislation reframed as a supportive measure. Given its many negative and paternalistic connotations, we no longer consider guardianship to be a helpful term.

Our intention at grade 1 is to create a system that is easy to use and provides enough flexibility to cover a wide range of situations with appropriate safeguards. Do you think the proposals achieves this?

If graded guardianship is introduced, in our view, the proposals for Grade 1 grant powers that are too wide-reaching to be considered an 'administrative decision'. The current proposals allow a wide range of powers to be sought. The only limits regarding the powers themselves, as opposed to the level of disagreement, are the amount of property and a significant restriction on liberty. This leaves a broad range of powers under Grade 1 including regarding care and treatment and daily activities.

In our view, consent to medical treatment and decisions on the level of care are not suitable for Grade 1 guardianship particularly if an appointment capable of overriding the individual's will and preference is subject to only administrative review. This is of particular concern given the low level of scrutiny proposed for such applications which in our view could fail to protect individuals' rights. There is a danger that too many people will be pushed into grade one and we believe serious thought and advice will be required to ensure that applicants only seek those powers strictly required.

However, if Grade 1 guardianship was reformulated as a co-decision making model, the standard of scrutiny required might be lower. We believe there is potential for Grade 1 to be reconstructed as a supported decision making model where legal authority would be shared between the individual and the appointed person. In this model the individual could make the appointment and no one could be appointed against their wishes. The appointed person would have a duty to ascertain the individual's will and preferences as far as possible and could not act against the individual's wishes.

Are the powers available at each grade appropriate for the level of scrutiny given?

For the level of scrutiny at Grade 1 please see the previous answer.

If graded guardianship is introduced, the level of scrutiny proposed at Grade 2 would be similar to what happens in many guardianship cases at present where decisions are largely based on the submitted evidence. We agree that at grade 2 the level of scrutiny should be higher by virtue of the seriousness of the impact on the individual's rights. In cases where there are significant intervention in the affairs of the adult decisions should be subject to judicial scrutiny including:

- Any significant restrictions of liberty
- Some circumstances of care which may engage Article 3 or 8 ECHR
- Significant financial control over the individual
- Decisions which conflict with the will and preference of the individual.

We agree that contentious matters should be determined by a full hearing of a judicial authority at Grade 3. This is appropriate for situations where a decision will need to be made as to which person is best placed to make a decision which respects the rights, will and preference of the individual and for certain situations of heightened vulnerability.

We are suggesting that there is a financial threshold for grade 1 guardianships to be set by regulations. Do you have views on what level this should be set at?

We are not convinced that a financial cut-off point is a good barometer of power. If an appointed person has control over the entirety of a person's finances, the potential for them to control the individual is significant, whether the amount is small or large.

We are proposing that at every stage of application, if a party to the application requests a hearing, one should take place. Do you agree with this?

We agree that a hearing should be available to all those who request it. However, we have concerns about the onus this places in the adult. Anecdotally, we know that people with learning disabilities are sometimes unaware that an application for Guardian has been made for them. It is crucial people with learning disabilities are made aware of their right to request a hearing and that appropriate steps are taken to place the support and participation of the individual at the centre of the process. There should include obligations to involve the adult at early stages, in discussing matters at hand, in determining any support that should be provided to them, all with a view to maximising their autonomy and reducing the need for interventions.

We have categorised grade 3 cases as those where there is some disagreement between interested parties about the application. There are some cases where all parties agree, however there is a severe restriction on the adult's liberty. For instance very isolated and low stimulus care settings for people with autism, or regular use of restraint and seclusion for people with challenging behaviour. Do you think it is enough to rely on the decision of

the Sheriff/tribunal at grade 2 (including a decision to refer to grade 3) or should these cases automatically be at grade 3?

We consider that the increased vulnerability of individuals in these situations requires a higher degree of scrutiny and should automatically be considered at Grade 3.

Do you agree with our proposal to amalgamate intervention orders into graded guardianships?

We agree that the uncertainties regarding supervision of Intervention Orders should be addressed and we do not envisage them being required if time limited and situation specific guardianship orders are put in place.

Do you agree with the proposal to repeal Access to Funds provision in favour of graded guardianship?

Do you agree with the proposal to repeal the Management of Resident's Finances Scheme?

If so, do you agree with our approach to amalgamate Management of Resident's Finances into Graded Guardianship?

We propose that the legislation provides a framework for all types of support and necessary interventions, including measures which range from light touch assistance to intensive support. Such a framework should allow for the possibility that intervention will be necessary in certain circumstances but the onus should be on those providing support to demonstrate that it is unavoidable.

We have concerns about extending the category of those who may be appointed guardians to include third sector organisations, solicitors and care providers. In our view this presents significant potential for conflict of interest or concentrations of power.

Chapter 8 – Forums for cases under adults with incapacity legislation

Do you think that OPG is the right level of authorisation for simpler guardianship cases at grade 1?

We are not convinced that the OPG is the most appropriate body to scrutinise applications and determine the suitability of those seeking guardianship order. As already discussed, we think Grade 1 guardianship grants powers too wide-reaching to be considered an administrative decision. The range of both financial and welfare powers are significant and in our view all cases which involve an adults legal autonomy being transferred to a guardian warrant the oversight of professional/legal judgement in addition to the assurance that process and procedure is followed.

Which of the following options do you think would be the appropriate approach for cases under the AWI legislation?

Office of the Public Guardian considering grade 1 applications, a Sheriff in chambers considering grade 2 applications on the basis of documents received, then a Sheriff conducting a hearing for grade 3 applications.

Or

Office of the Public Guardian considering grade 1 applications, with a legal member of the Mental Health Tribunal for Scotland considering grade 2 applications on the basis of the documents received, then a 3 member Mental Health Tribunal hearing grade 3 applications.

Please also give your views on the level of scrutiny suggested for each grade of guardianship application.

As discussed above we have concerns about the OPG processing applications at Grade 1. However, we do believe there is merit in the proposals for applications for guardianship being considered by a tribunal. A tribunal system has potential to be more accessible and specialist and as demonstrated by Mental Health Tribunals a lay member can often provide a useful challenge to professionals. We consider that all tribunals should be comprised of a panel of three member, rather than just one legal member.

We believe that effective scrutiny of the process and appropriate support is as important as who considers the cases. Regardless of the forum for decision making, it is necessary to have specialist expertise, training, and systems to develop a fair and consistent approach. Decision makers require a robust understanding of supported decision-making to ensure meaningful involvement of the adult in a person-centred way. In our view, decision makers must meet the adult to whom the application relates, including if this involves a visit to the adult.

Chapter 9 – Supervision and support for guardians

Is there a need to change the way guardianships are supervised?

If your answer is yes, please give your views on our proposal to develop a model of joint working between the OPG, Mental Welfare Commission and local authorities to take forward changes in supervision of guardianships.

If you consider an alternative approach would be preferable, please comment in full.

We agree there is a need to change the way guardianships are supervised so that supervision becomes more meaningful and sustainable. The proposals do not set out what the levels of supervision at Levels 1 and 2 will be but the robust assessment of risk is all the more important if supervision for such cases is low or non-existent.

We do think that there are benefits to financial and welfare matters be considered together and that there is merit in a model of joint working between the OPG, MWC and local authorities. However, given that the capacity of local authorities is under

pressure when supervision is required, there is also potential for conflicts of interest in determining whether supervision is necessary.

If Grade 1 were constructed as a co-decision making model rather than substitute-decision making one which requires an adult to assume legal autonomy on the adult's behalf, we think there could be a role for the OPG to register, oversee and support the process and to investigate any complaint of conflict of interest or undue influence.

What sort of advice and support should be provided for guardians?

Do you think there is a need to provide support for attorneys to assist them in carrying out their role?

We believe that advice and support for both guardians and attorneys is crucial. This should focus on:

- developing an understanding of their role in supported decision-making
- how to apply CRPD principles and AWI principles

Anecdotally, we know that people who apply to be a guardian sometimes lack a full understanding of what is involved. Support and guidance is also required for attorneys to ensure that people are fully aware of what they are signing up for. The current OPG guidance for attorneys would benefit from being more.

In order to help guardians more fully grasp their role and fulfil their responsibilities there is a requirement for statutory support and training on:

- co decision making
- the principles of shared decision-making
- the rights of the person they have guardianship for

It would be good practice for this training to be informed and delivered in partnership with people with lived experience of learning disability and other conditions for which they may be deemed to lack capacity. We also propose the establishment of a network set for guardians to meet, support and learn from each other.

Chapter 10 – Order for cessation of residential placement, short term placement order

Do you agree that an order for the cessation of a residential placement or restrictive arrangements is required in the AWI legislation?

We support the measure for an order for cessation of significant restrictions of liberty, to enable a person to raise proceedings to challenge continuation of a placement or conditions in that placement. This provides direct protection against de facto detention providing an important safeguard where someone in a position to raise a challenge.

Do you agree that there is a need for a short term placement order within the AWI legislation?

If you agree, does the above approach seem correct or are there alternative steps we should take? Please comment as appropriate.

We recognise the need for appropriate safeguards and recognise the process will leave a gap for matters of an emergency nature. We, therefore, support the proposal for a short term placement order which can be used to move an individual to accommodation at short notice where no other authority exists, the person is unable to consent because of lack of capacity and there is a need to move the person quickly for their own safety and wellbeing. In the first instance, however, there should be concerted attempts to enable the adult to exercise their legal capacity and this should be reflected in the criteria for the granting of an order.

Do you consider that there remains a need for section 13ZA of the Social Work (Scotland) Act 1968 in light of the proposed changes to the AWI legislation?

Anecdotally, we have heard that 13Za is sometimes used as a convenient tool to move people without an appropriate degree of consultation. We are concerned that it lacks sufficient safeguards against arbitrary detention and substitute decision-making. In light of the proposed changes, we do not consider that there remains any need for section 13ZA.

Chapter 11 – Advance directives

Should there be clear legislative provision for advance directives in Scotland or should we continue to rely on common law and the principles of the AWI Act to ensure peoples' views are taken account of?

Advance planning is an important aspect of supported decision-making which can help to protect an individual's rights. In particular advance directives, by encouraging individuals to consider their wishes in depth and provide clarity for medical practitioners can reduce the number of situations in which an intervention is necessary. We welcome any structures which promote the use of advance directives including legislative provision.

Chapter 12 – Adjustment to authorisation for medical treatment

Do you agree that the existing s.47 should be enhanced and integrated into a single form?

We agree that there is a need to provide clear and specific procedures for these situations. It is important, however, that these proposals do not widen the scope for restricting the adult's legal capacity and permitting non-consensual interventions. We think there is a need for separate safeguards to address the question of detention and the question of medical treatment. The ability to appeal by the adult and their family/proxy/guardian is an essential safeguard and we agree with the proposals in that regard. We agree also that an end date must be fixed and that

procedures must be designed to ensure that an adult is not kept in hospital without therapeutic reason, in compliance with the Article 5 ECHR requirement to ensure there remains a continuing necessity for detention. We are not in favour of the range of professionals being extended. We are particularly concerned about such an extension if the power of those professionals can extend from authorising medical treatment to detaining an adult for treatment.



Lorne Berkley
Policy Development Officer
Scottish Commission for Learning Disability